Supreme Court, U.S.
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No. ___

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IN THE

Supreme Court of the United States

PROVOST ☆ UMPHREY LAW FIRM, L.L.P.,
WALTER UMPHREY, P.C., AND T. WALTER UMPHREY,
Petitioners,

v.

SONYA B. COFFMAN.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In at least four federal circuit courts, an arbitration clause providing for arbitration of "any dispute or claim arising under the agreement" would be construed broadly, encompassing all claims asserted in the underlying lawsuit. Given the strong federal policy in favor of arbitration, did the Fifth Circuit err in construing such a clause narrowly, encompassing only those claims relating to the interpretation of the agreement itself?

Does a subsequent contract containing both an arbitration provision and a merger clause, which replaces all prior inconsistent agreements, require arbitration of all disputes between the parties, including those arising under the earlier agreements? The Fifth Circuit conflicts with the Ninth Circuit on this issue.

PARTIES

There are none other than the named parties herein.

LIST PURSUANT TO RULE 29.6

There is no parent corporation of Walter Umphrey, P.C. There is no publicly held company owning 10% or more of Walter Umphrey, P.C.'s stock.

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SONYA B. COFFMAN.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals denying the Petition for Rehearing was entered on April 4, 2002, is not reported, and is included in the Appendix at 1a-2a. The panel opinion of the Fifth Circuit was issued on March 7, 2002, is not reported, and is included in the Appendix at 3a. The opinion of the United States District Court for the Eastern District of Texas was issued on April 5, 2001, is reported at 161 F.Supp.2d 720, and is included in the Appendix at 4a-24a.

JURISDICTION

The opinion and judgment of the court of appeals was entered on March 7, 2002. The order denying the Petition for Rehearing was entered on April 4, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

9 U.S.C. §2 provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

This case presents an important and recurring issue affecting the rights of parties to arbitrate controversies arising out of contracts. Specifically at issue is the distinction made by two courts of appeals that signatories to arbitration clauses who agree to arbitrate all disputes "arising under" or "arising out of" an underlying contract have made an agreement that is more restrictive in application than those parties who agree to arbitrate all disputes "arising under or related to" an underlying contract. The Second, Third, Seventh, Tenth and Eleventh Circuits do *not* recognize this distinction.

A severe problem is caused by the conflict because parties who agree to arbitrate disputes in the two circuits that enforce the distinction do not enjoy the full protections afforded by the Federal Arbitration Act that agreements to arbitrate are irrevocable and are to be enforced in a manner favoring

arbitration. In an increasingly commercialized world, accompanied by a substantial increase of contracts containing arbitration clauses, it is impossible for contracting parties to fashion arbitration clauses broad enough to cover all disputes that might arise between them so long as this conflict between the circuits exists. A uniform rule regarding the manner in which arbitration clauses such as the one at issue are to be enforced and applied is needed. Settlement of the conflict is needed so that a consistent commercial policy that complies with the Federal Arbitration Act may be effected. Only this Court can provide the uniformity needed.

The basis for federal jurisdiction in the court of the first instance, as originally pled by Sonya Coffman ("Coffman") in her Original Complaint filed on or about July 1, 1999, is pursuant to 28 U.S.C. § 1331, as certain claims arise under the Constitution, laws or treaties of the United States. Specifically, Coffman alleges violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

FACTUAL AND PROCEDURAL BACKGROUND

1. On or about July 6, 1992, Coffman joined the Provost ☆ Umphrey Law Firm as an associate attorney.[1] Effective on or about January 1, 1995, Coffman was promoted to non-equity partner. Since 1986, Provost ☆ Umphrey has conducted its business and operations pursuant to a written partnership agreement. As a non-equity partner, Coffman signed the 1994 Partnership Agreement, the 1996 Partnership Agreement, the 1996 Amendment No. 1 (effective January 1, 1997), and the 1998 Partnership Agreement.

---

[1] For purposes of this Petition, Provost ☆ Umphrey Law Firm, L.L.P., Walter Umphrey, P.C. and T. Walter Umphrey shall be referred to singularly and collectively as "Provost ☆ Umphrey."

Each of the above-referenced Partnership Agreements constitutes a complete amendment to its predecessor, as evidenced by the following clauses within each Agreement:

> WITNESSETH: . . . WHEREAS, the current Partners desire to amend and completely restate the partnership agreement between them in order to clarify each Partner's respective rights, obligations and entitlements in the Partnership."
>
> . . .
>
> *Section 13.5. Entire Agreement.* This Agreement contains the entire agreement among the Partners relating to the subject matter hereof and all prior agreements relative hereto which are not contained herein are terminated.

Each Agreement also confirms that anyone who signs the Agreement "acknowledges and agrees that they have read this agreement and the attached exhibits and have had ample time to make such inquiry as they deem necessary . . . [and that] this agreement was entered into after the due consideration by the partners after having the opportunity to consult with their own attorneys and advisors."

Section 13.15 of the 1996 Amendment No. 1, entitled "*Binding Arbitration*," became incorporated into the 1996 Partnership Agreement effective January 1, 1997. Section 13.15 provides the following:

> *BINDING ARBITRATION.* THE EQUITY PARTNERS AND NON-EQUITY PARTNERS SHALL MAKE A GOOD FAITH EFFORT TO SETTLE ANY DISPUTE OR CLAIM ARISING UNDER THIS PARTNERSHIP AGREEMENT. IF THE EQUITY OR NON-EQUITY PARTNERS FAIL TO RESOLVE A DISPUTE OR CLAIM, SUCH EQUITY OR NON-EQUITY PARTNER SHALL SUBMIT THE DISPUTE OR CLAIM TO BINDING ARBITRATION UNDER

THE RULES OF THE AMERICAN ARBITRATION ASSOCIATION THEN IN EFFECT. JUDGMENT ON ARBITRATION AWARDS MAY BE ENTERED BY ANY COURT OF COMPETENT JURISDICTION.

All of the then-existing Equity and Non-Equity Partners signed the 1996 Amendment No. 1, including Coffman, acknowledging that, among other things, they had: (1) read the Agreement; (2) received ample time to make such inquiry as was deemed necessary by that person or entity; (3) expressly waived the ability to rely on any provisions of the Texas Partnership Act that were inconsistent with the partnership agreements; (4) been given the opportunity to consult with that person or entity's own attorneys and advisors; and that (5) due consideration by the partners was given. Section 13.15 was subsequently incorporated verbatim into the amended and completely restated 1998 Agreement, which was also signed by Coffman under the same acknowledgments as stated above.

2. In the latter part of 1998, Coffman resigned from Provost ☆ Umphrey and thereafter filed the underlying lawsuit. Coffman filed suit alleging breaches of certain partnership agreements, repudiation, breaches of fiduciary duties and the duty of good faith and fair dealing, and violations of Title VII and/or the Texas Commission on Human Rights Act ("TCHRA"). The complaint was later amended to add a cause of action under the Equal Pay Act.

Provost ☆ Umphrey answered Coffman's claims and filed its Motion to Compel Arbitration and to Dismiss with Prejudice, or Alternatively, to Stay Action, asserting all of Coffman's claims were governed by an arbitration clause contained in two of the partnership agreements. The district court issued its order referring to arbitration Coffman's claims for (1) breach of the Partnership Agreements in effect after January 1, 1997; (2) repudiation; (3) breach of the duty of good faith and fair dealing; and (4) breach of fiduciary

duty. The court refused to order arbitration of Coffman's claims for (1) breach of the 1994 and 1996 Partnership Agreements; (2) violations of Title VII and/or TCHRA; and (3) violations of the Equal Pay Act.

After the district court denied Provost ☆ Umphrey's motion to rehear the arbitration request, the law firm perfected its appeal to the Fifth Circuit Court of Appeals asserting the district court committed reversible error when it refused to refer all of Coffman's claims to arbitration. The court of appeals affirmed the district court "for essentially the reasons stated by the trial court." App. 3a. Apparently the Fifth Circuit considered the clause to be "narrow," and thus limited the scope of the arbitration provision to only those claims which literally arise under the contract or relate to the interpretation and enforcement of the contract. App. 3a, 10a.

Thus, according to the court of appeals, only Coffman's claims for breach of the 1996 Amendment No. 1 and 1998 Partnership Agreement (the contracts in existence at the time of and after execution of the arbitration agreement), and her breach of fiduciary duty claims are referable to arbitration. App. 3a, 24a. This narrow application releases Coffman from her commitment to arbitrate her claims for breach of the 1994 and 1996 Partnership Agreements, violations of Title VII and/or TCHRA, and violations of the Equal Pay Act, a commitment other courts of appeal would have likely enforced.

The distinction regarding "narrow" versus "broad" arbitration clauses enforced by the Fifth and Ninth Circuit creates a direct conflict with other courts of appeal on an issue important to commercial law. The distinction also conflicts with the strong presumption in favor of arbitration mandated by the Federal Arbitration Act ("FAA") as interpreted and applied by this Court.

3. The issues presented concern whether Coffman's breach of contract claims regarding the 1994 and 1996 Partnership Agreements, and her claims under Title VII and/or TCHRA,

and the Equal Pay Act should have been referred to arbitration. The claims at issue were not referred to arbitration because of the conflict between the courts of appeals. If the arbitration clause had been considered by other circuits, all of Coffman's claims would have been referred to arbitration. However, because the Fifth Circuit sided with the Ninth Circuit regarding this matter, the arbitration clause at issue was given an impermissibly restrictive interpretation, thereby depriving Provost ☆ Umphrey of the accommodations provided by the Federal Arbitration Act and releasing Coffman from her otherwise "irrevocable" commitment to arbitrate the entirety of her dispute.

REASONS FOR GRANTING THE PETITION

The decision below creates and furthers an acknowledged conflict among the circuits as to an issue that is fundamental to the administration and enforcement of the Federal Arbitration Act, *viz.*, how broadly should the Act be interpreted so as to encompass all possible disputes and claims about which the parties agreed to arbitrate. The Fifth Circuit decision, narrowly applying the scope of the arbitration clause at issue and improperly stating the rule of law, sides with the Ninth Circuit in a distinct minority. The Fifth and Ninth Circuits are in direct conflict with the Second, Third, and Eleventh Circuits regarding the precise wording of the arbitration clause at issue, and the Seventh and Tenth Circuits regarding similar wording. For these reasons, this case merits review by this Court to ensure a uniform interpretation of the scope and enforceability of 9 U.S.C. § 2.

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AND OF THIS COURT ON THE SAME IMPORTANT MATTER OF FEDERAL LAW

A. The Applicable Standard Under the FAA.

The arbitrability of the parties' dispute is for the court to decide, not the arbitrator. *AT&T Technologies, Inc. v. Communication Workers of America*, 475 U.S. 643, 649, 106 S.Ct. 1415, 1418, 89 L.Ed. 2d 648 (1986). In determining arbitrability, the court must take into account the strong federal policy favoring enforcement of agreements to arbitrate. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226, 107 S.Ct. 2332, 2337, 96 L.Ed. 2d 185 (1987); *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983). This policy is intended to prevent "[c]ontracts to arbitrate [from being] avoided by allowing one party to ignore the contract and resort to the courts." *Southland Corp. v. Keating*, 465 U.S. 1, 7, 104 S.Ct. 852, 856, 79 L.Ed. 2d 1 (1984).

So strong is the policy favoring arbitration that enforcement of the agreement "should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T*, 475 U.S. at 650,106 S.Ct. at 1419 (quoting *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 582-83, 80 S.Ct. 1347, 1353, 4 L.Ed. 2d 1409 (1960)). Accordingly, any doubts as to arbitrability should be resolved in favor of arbitration. *Id.*; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S.Ct. 3346, 3353, 87 L.Ed. 2d 444 (1985).

Finally, the court is not to consider the merits of the underlying controversy in deciding whether it should be submitted to arbitration. *AT&T*, 475 U.S. at 649, 106 S.Ct. at

1418. The only issues at this stage are whether the parties' agreement to arbitrate encompasses the dispute, and if so, whether the law permits arbitration of the dispute. *Mitsubishi*, 473 U.S. at 628, 105 S.Ct. at 3355. If both these questions are answered in the affirmative, the court has no discretion, and must direct the parties to proceed to arbitration. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217-18, 105 S.Ct. 1238, 1240-41, 84 L.Ed. 2d 158 (1985).

Despite the foregoing authority, the Fifth Circuit and Ninth Circuit have carved out their own rule and created a distinction between "broad" arbitration clauses and "narrow" arbitration clauses. The determinative factor in the distinction is whether the phrase "or related to" is added to the terms "arise under" or "arise out of." Enforcement of this distinction not only conflicts with the Second, Third, Seventh, Tenth and Eleventh Circuits, it constitutes a complete failure to apply the proper rule of law regarding the broad interpretation to be given the Federal Arbitration Act. Indeed, the Act utilizes the verbiage "arising out of," the very phrase the Fifth and Ninth Circuits find so limiting.

B. The Fifth Circuit Creates a Conflict

Coffman agreed, supposedly irrevocably, to submit any dispute or claim she had with Provost ☆ Umphrey "arising under" the Partnership Agreement to arbitration under the rules of the American Arbitration Association. According to the strong presumption favoring arbitration afforded by the Federal Arbitration Act and as enforced by the Second, Third, Seventh, Tenth and Eleventh Circuits, all of Coffman's disputes with Provost ☆ Umphrey (the breach of contract claims and the statutory claims) should have been referred to arbitration.

The district court, however, determined a distinction exists between arbitration clauses that utilize the terms "arising under" or "arising out of" from those arbitration clauses that

use the term "arising under or related to," the former being given a narrow application, the latter being given a broad application. App. 9a-10a. The Fifth Circuit affirmed the district court "for essentially the reasons stated by the trial court." App. 3a. Thus, the district court's reasoning is expressly accepted by the Fifth Circuit as that of its own. Due to the narrow scope given the Provost ☆ Umphrey arbitration clause because of its use of "arising under" instead of "arising under or related to," the Fifth Circuit, through the district court, determined Coffman's breach of the 1994 and 1996 Partnership Agreements claims and her statutory claims should not be referred to arbitration.

In its holding, the Fifth Circuit labels the arbitration clause at issue a narrow clause and restricts its application only to those claims which "literally arise under the contract." App. 3a, 10a. This holding is in accord with the Ninth Circuit's position on this issue. Both circuits base their reasoning upon the opinion in *In re Kinoshita & Co.*, 287 F.2d 951 (2d Cir. 1961). *Kinoshita* created the "narrow clauses" versus "broad clauses" conflict when it concluded the phrase "arising under" is narrower in scope than the phrase "arising out of or relating to." *Id.* at 953. As outlined below, the Third, Seventh, Tenth, Eleventh and, apparently, the Second Circuits have rejected, ignored or disregarded *Kinoshita* and are in direct conflict with the Fifth and Ninth Circuits on this issue.

C. Conflict with Other Circuits

1. *Eleventh Circuit*

The opinion below is in direct conflict with *H.S. Gregory v. Electro-Mechanical Corp.*, 83 F.3d 382 (11th Cir. 1996). The issue in *Gregory* involved a stock purchase agreement which contained an arbitration clause providing "any dispute between any of the Parties which may arise hereunder...will be referred to arbitration." *Id.* at 383. Six of the plaintiffs' counts were phrased in tort terms while the remaining count

was for breach of contract. *Id.* at 384. The district court referred the breach of contract claim to arbitration but refused to refer the tort claims to arbitration. *Id.* at 382. Determining that the language "arising hereunder" required arbitration of all the claims asserted, including Plaintiffs' tort claims, the court of appeals reversed the district court. *Id* at 383.

In agreeing the term "arising hereunder" is a broad arbitration clause, the court expressly rejected *Kinoshita* as "not being in accord with present day notions of arbitration as a viable alternative dispute resolution procedure." *Id.* at 385. The court noted further that every claim in Plaintiffs' complaint targeted the fact that they did not receive the amount of money they should have under the stock purchase agreement, although the claims were couched in various terms and theories of action. *Id.* at 384. "There are seven counts, and every count incorporates all of the facts alleged in the counts denominated as a breach of contract claim." *Id.*

This is the same situation as the present action wherein all of Coffman's claims, despite the labels she gives to them, target the complaint that she did not receive the amount of money that she thought she should have earned under the partnership agreement. Although it was interpreting an almost identical arbitration clause, the Fifth Circuit applied the Coffman agreement in a manner in direct conflict with that of the Eleventh Circuit. Instead, it applied an interpretation in line with the discredited *Kinoshita* opinion, an opinion rejected by the Eleventh Circuit.

2. *Third Circuit*

In *Battaglia v. McKendry*, 233 F.3d 720 (3rd Cir. 2000), the parties had signed an underlying settlement agreement and agreed to arbitrate "any controversy" that "arises hereunder," referring directly to the settlement agreement. *Id.* at 723. Battaglia attempted to argue that because the arbitration clause used the language "any controversy [that] arises

hereunder [*i.e.*, under the Settlement Agreement], other than broader language such as 'any controversy arising under or related to the Settlement Agreement,'" the arbitration clause did not encompass the counterclaim made by McKendry. *Id.* at 724-25. The appellate court rejected this argument and agreed with the district court that the arbitration clause was sufficiently broad to reach disputes regarding the formation of the settlement agreement. *Id.* at 725.

In analyzing the scope of the agreement, the Third Circuit discussed and criticized *Kinoshita* at length. *Id.* at 725-26. The court acknowledged the negative treatment afforded *Kinoshita*—even within the Second Circuit—and declined to follow any court that continued to follow *Kinoshita*, specifically naming the Ninth Circuit. *Id.* at 726-27. The court did approve the Eleventh Circuit's holding in *Gregory* and determined it would follow the same. *Id.* at 727.

The *Battaglia* court determined phrases such as "arising under" and "arising out of" are normally given broad construction, and that interpretation is consistent with Federal law that an agreement to arbitrate a particular dispute "should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Id.* at 727.

3. *Seventh Circuit*

In *Harter v. Iowa Grain Co.*, 220 F.3d 544 (7th Cir. 2000), the court interpreted broadly an arbitration clause wherein the parties provided for arbitration of "any disputes or controversies arising out of" certain grain contracts. *Id.* at 549. Concentrating on the "any disputes" portion of the arbitration clause, the court determined the clause was broad enough to refer all of plaintiff's claims to arbitration, including tort and statutory claims. *Id.* at 549, 553. The court disagreed strongly that Harter received "something completely different" than what he "bargained for" when his claims were adjudicated by arbitration. *Id.* at 553.

4. *Tenth Circuit*

In *Zinc v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 13 F.3d 330 (10th Cir. 1993), the parties agreed to arbitrate "[A]ny controversy between [the parties] arising out of [plaintiff's] business or this agreement." *Id.* at 332. Zinc filed suit asserting state and federal claims in connection with certain bond purchases that occurred prior to the parties' execution of the agreement containing the arbitration clause. *Id.* at 331-332. Zinc contended that an agreement to arbitrate a dispute must pre-date the actions giving rise to the dispute. *Id.* at 332. The court found this contention misplaced and that such a suggestion "runs contrary to contract principles which govern arbitration agreements." *Id.* The court determined the arbitration agreement was clearly broad enough to cover the dispute at issue, despite the fact the dealings giving rise to the dispute occurred prior to the execution of agreement. *Id.* The court cited that portion of § 2 of the Federal Arbitration Act dictating that "any agreement in writing to submit to arbitration an existing controversy arising out of . . . a contract shall be valid under the Act." *Id.* at 334.

Accordingly, the Tenth Circuit would have referred all of Coffman's claims that pre-date the 1996 Amendment No. 1 (the document containing the arbitration clause at issue) to arbitration as such referral would effect the agreement of the parties and comply with the Federal Arbitration Act.

5. *Second Circuit*

Although not expressly rejecting *Kinoshita*, the Second Circuit has distanced itself enough from the problem it created such that rejection may be implied.

The Second Circuit first limited *Kinoshita* in *S.A. Mineracao da Trindade-Samitri v. Utah Int'l, Inc.*, 745 F.2d 190 (2d Cir. 1984), where the court found that an arbitration clause requiring arbitration of "any question or dispute . . . aris[ing] or occur[ing] under" the agreement was sufficiently

broad to reach claims of fraud in the inducement. *Id.* at 192. The court acknowledge that *Kinoshita* is inconsistent with the federal policy favoring arbitration, but it declined to overrule it on policy grounds. *Id.* at 194.

The Second Circuit again chose not to rely upon *Kinoshita* in *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840 (2d Cir. 1987). There the Second Circuit found that an arbitration clause requiring arbitration of "all claims and disputes of whatever nature arising under this contract" was broad enough to reach claims of fraud in the inducement. *Id.* at 854. The court again recognized that *Kinoshita* is inconsistent with the federal policy favoring arbitration. *Id.* Although it did not expressly overrule *Kinoshita*, the Second Circuit's strong criticism of the theory it created and reluctance to follow its own precedent left it too weak to survive the direct assaults later launched against it by the Third and Eleventh Circuits, assaults of which the Second Circuit must certainly approve.

D. The Conflict Began with *Kinoshita*

As discussed above, the Fifth Circuit's conflicting holding traces its ancestory to the opinion in *Kinoshita*, an opinion that gave rise to the conflict at issue. The district court's misguided reliance upon *Kinoshita*, a case soundly criticized, discarded and expressly rejected by other circuits, underscores the need for this Court to intervene and establish a clear rule regarding the enforcement of arbitration clauses containing similar language.

The tie back to *Kinoshita* begins with the Fifth Circuit's reliance upon dicta in *Pennzoil Exploration and Production Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1064 (5th Cir. 1998) (an arbitration clause that contains only the terms "arising out of" or "arising under" is a narrow clause, and an arbitration clause containing the additional terms "connected with" or "related to" is a broad clause). App. 3a, 10a.

Pennzoil's dicta is based upon *Tracer Research Corp. v. National Environmental Services Co.*, 42 F.3d 1292 (9th Cir. 1994). *Pennzoil*, 139 F.3d at 1067. In *Tracer*, the Ninth Circuit narrowly interpreted an arbitration clause utilizing the words "arising out of" as a narrow arbitration clause. *Tracer*, 42 F.3d at 1295. "An arbitration clause that covered disputes 'arising under' an agreement, but omitt[ing] reference to claims 'relating to' an agreement, covered only those disputes 'relating to the interpretation and performance of the contract itself.'" *Id.*

Tracer's legal support is based upon *Mediterranean Enterprises, Inc. v. Ssangyong Corp.*, 708 F.2d 1458 (9th Cir. 1983). *Tracer*, 42 F.2d at 1295. In *Mediterranean Enterprises*, the Ninth Circuit narrowly applied an arbitration clause wherein the parties agreed to arbitrate "any disputes arising hereunder." *Mediterranean Enterprises*, 708 F.2d at 1461, 1464. The court determined omission of "relating to" from the arbitration clause was significant "in this circuit." *Id.* at 1464. Thus, the Ninth Circuit is squarely in agreement with the Fifth Circuit that arbitration clauses using the words "arising under" but omitting the words "or related to" are narrow in scope, and only those claims relating to performance and interpretation of the agreement are arbitrable.

Mediterranean Enterprises' authority lies in *Kinoshita*. *Mediterranean Enterprises*, 708 F.2d at 1464. In *Kinoshita*, the Second Circuit concluded that when an arbitration clause refers to disputes or controversies "under" or "arising out of" the contract, arbitration is restricted to "disputes and controversies relating to the interpretation of the contract and matters of performance." *Kinoshita*, 287 F.2d at 953. The court reasoned that the phrase "arising under" is narrower in scope than the phrase "arising out of or relating to." *Id.*

The Third and Eleventh Circuits have expressly rejected *Kinoshita*. The Second Circuit has declined to follow it despite the fact that it is the court that created it. Thus, the

Fifth and Ninth Circuit's reliance upon *Kinoshita* in support of their conflicting holdings is suspect. A heavily criticized and discredited case is the crux of the conflict this Court should resolve.

E. Conflict Between the Fifth Circuit and Ninth Circuit Regarding Effect of the Coffman Merger Clause

Despite their agreement in the "arise under" or "arise under or related to" distinction, the Fifth Circuit and Ninth Circuits disagree on the enforcement of merger clauses. They specifically disagree whether an arbitration provision contained in a later agreement that contains a merger clause superseding all prior agreements may be enforced to refer disputes arising under the earlier agreements to arbitration. In the *Coffman* opinion, the Fifth Circuit holds the merger clause in the 1996 Amendment No. 1, which also contains the original arbitration clause, cannot be used as a basis by which to refer Coffman's breach of contract claims regarding the 1994 and 1996 Partnership Agreements to arbitration. App. 3a, 15a-18a. This holding conflicts with the Ninth Circuit in *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716 (9th Cir. 1999).

In *Simula*, a 1993 non-disclosure agreement and a 1994 letter of intent covered the proposed working relationship between the two parties, but neither contained an arbitration clause. *Id.* at 718-719. A subsequent agreement signed by both parties in 1995 contained an arbitration clause regarding "all disputes arising in connection with this Agreement" and a merger clause stating: "[The Agreement] constitutes the entire understanding and agreement. Any other previous negotiations, discussions, and written or oral agreements between the parties on the subject matter of this Agreement are superseded hereby." *Id.* at 723.

Simula contended the claims under the 1993 and 1994 agreements were not arbitrable because they related to

conduct occurring prior to the date on which the parties entered into the arbitration clause. *Id.* Reviewing the merger clause, the court held that the 1995 Agreement subsumed the earlier agreements. *Id.* Thus any obligations of Autoliv under the 1993 nondisclosure agreement and January 1994 letter of intent were incorporated into the 1995 Agreement under the merger clause, and therefore subject to arbitration. *Id.*

The merger clause in the Provost ☆ Umphrey agreement similarly amended the earlier partnership agreements and voided any prior provisions inconsistent with the current agreement. This merger clause references Coffman's intent to abandon and replace earlier agreements that did not provide for arbitration. Under the *Simula* opinion, the Ninth Circuit would have enforced the Provost ☆ Umphrey merger clause and referred all of Coffman's claims, including the claims for breach of the 1994 and 1996 Partnership Agreements, to arbitration. Therefore, there exists a conflict between the Fifth and Ninth Circuits regarding the scope and enforceability of merger clauses.

F. Summation

The Fifth and Ninth Circuit have created a distinction between arbitration clauses that refer disputes "arising under or arising out of an agreement" to arbitration from those that refer disputes "arising under or related to an agreement" to arbitration. The former clauses are given a narrow and restrictive application. The latter clauses are given a broad and liberal application. The Fifth and Ninth Circuit have given undue importance to semantics and have limited the broad federal policy favoring arbitrations. There exists a conflict between the circuits in this regard as other circuits expressly disapprove the semantical distinction created by the Fifth and Ninth Circuits. The Fifth and Ninth Circuit's distinction also serves as a misapplication of the proper rule

of law regarding broad enforcement of the Federal Arbitration Act, an Act that uses the very "arise out of" language the Fifth Circuit finds so limiting.

As the clause in issue uses the language "arising under" and omits "relating to," the Fifth Circuit narrowly construed the Provost ☆ Umphrey arbitration clause and excluded Coffman's breach of contract claims regarding the 1994 and 1996 Partnership Agreements and her statutory claims from arbitration. It may be assumed that the Second, Third, Seventh, Tenth and Eleventh Circuits would have interpreted the arbitration clause broadly and referred all of the claims to arbitration, as the parties agreed, resolving all doubts in favor of arbitration.

Regarding the merger clause, the Fifth and Ninth Circuits conflict. The Ninth Circuit honors a merger clause wherein the parties agree all prior agreements are voided and the parties' relationship will be governed by the new agreement. Utilizing this rule, the Ninth Circuit would hold an arbitration clause contained in a later agreement which also has a merger clause causes all claims relating to any prior agreements to be referred to arbitration. The Fifth Circuit disagrees with this application. Under the Fifth Circuit's reasoning, the merger clause does not apply in a manner enforcing the arbitration clause contained in the later agreement as binding upon all claims regarding the earlier agreements.

These conflicts directly concern important commercial matters and complicate the enforcement of arbitration agreements. Accordingly, the Court should grant review of this case and resolve these conflicts regarding application of the Federal Arbitration Act.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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July 3, 2002

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Filed April 4, 2002]

No. 01-40761

SONYA B COFFMAN,
Plaintiff-Appellee,

v.

PROVOST UMPHREY LLP; WALTER UMPHREY PC; T WALTER UMPHREY,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Texas, Beaumont

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ON PETITION FOR REHEARING EN BANC

(Opinion 03/07/02, 5 Cir.,_____, _____ F.3d_____)

Before HIGGINBOTHAM, DeMOSS, and BENAVIDES, *Circuit Judges*.

PER CURIAM:

(√) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition of Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R APP. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed March 07 2002]

No. 01-40761

SONYA B COFFMAN,
Plaintiff-Appellee,

v.

PROVOST UMPHREY, LLP; WALTER UMPHREY, PC;
T. WALTER UMPHREY,
Defendants-Appellants.

Appeal form the United States District Court for the Eastern District of Texas
(1:99-CV-628)

Before HIGGINBOTHAM, DeMOSS, and BENAVIDES, *Circuit Judges.*

PER CURIAM: *

We affirm for essentially the reasons stated by the trial court.

AFFIRMED.

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* Pursuant to 5th CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

APPENDIX C

UNITED STATES DISTRICT COURT
E.D. TEXAS
Beaumont Division

No. 1:99-CV-628

SONYA B. COFFMAN,

Plaintiff,

v.

PROVOST * UMPHREY LAW FIRM, L.L.P.,
Walter Umphrey P.C., and T. Walter Umphrey,

Defendants.

April 5, 2001

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO COMPEL ARBITRATION AND TO DISMISS WITH PREJUDICE, OR ALTERNATIVELY, TO STAY ACTION

SCHELL, *District Judge*.

This matter is before the court on "Defendants' Motion to Compel Arbitration and to Dismiss With Prejudice, or Alternatively, to Stay Action" (Dkt.# 4), filed on August 30, 1999. Plaintiff filed a Response on September 14, 1999, Defendants filed a Reply on October 5, 1999, Plaintiff filed a Surreply on January 24, 2000, and Defendants filed a Response to Plaintiff's Surreply on January 28, 2000. Upon consideration of the parties' written submissions and the applicable law, the court is of the opinion that Defendants' motion should be GRANTED IN PART and DENIED IN PART.

I. BACKGROUND

Plaintiff is a former employee of Provost * Umphrey Law Firm, L.L.P. ("Provost * Umphrey").[1] Plaintiff originally brought this action against Defendants alleging breach of contract, repudiation, breach of fiduciary duty, breach of the *723 duty of good faith and fair dealing, and violations of Title VII and/or the Texas Commission on Human Rights Act ("TCHRA"). Plaintiff later amended her complaint to add a cause of action under the Equal Pay Act. Defendants ask this court to dismiss Plaintiff's action and to compel submission of all of her claims to arbitration. If this court determines that only some of Plaintiff's claims are subject to arbitration, Defendants alternatively ask this court to stay all proceedings until such arbitration has been completed.

Defendants' motion is based upon various partnership agreements which govern the business and operations of Provost * Umphrey. The original partnership agreement was first effective on August 26, 1986. Plaintiff did not sign that agreement. Since that time, however, the original partnership agreement has been amended and restated on several occasions. Plaintiff admits that she signed the following four partnership agreements:

- *Restated Partnership Agreement of Provost * Umphrey Law Firm, L.L.P.*—Effective January 1, 1994 ("1994 Partnership Agreement").

- *Restated Partnership Agreement of Provost * Umphrey Law Firm, L.L.P.*—Effective January 1, 1996 ("1996 Partnership Agreement").

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[1] Plaintiff was hired as an associate attorney in 1992 and was subsequently promoted to non-equity partner on January 1, 1995. In the latter part of 1998, Plaintiff voluntarily resigned from Provost * Umphrey.

- *Amendment No. 1 to the Restated Partnership Agreement of Provost * Umphrey Law Firm, L.L.P., Dated January 1, 1996*—Effective January 1, 1997 ("1996 Amendment No. 1").

- *Partnership Agreement of Provost * Umphrey Law Firm, L.L.P.*, As Restated—Effective January 1, 1998 ("1999 Partnership Agreement").

The 1994 and 1996 Partnership Agreements do not contain an arbitration clause. The 1996 Amendment No. 1 and the 1998 Partnership Agreement, on the other hand, both contain an identical arbitration clause as follows:

> *Binding Arbitration*. The equity partners and non-equity partners shall make a good faith effort to settle any dispute or claim arising under this partnership agreement. If the equity or non-equity partners fail to resolve a dispute or claim, such equity or non-equity partner shall submit the dispute or claim to binding arbitration under the rules of the American Arbi-tration Association then in effect. Judgment on arbitra-tion awards may be entered by any court of competent jurisdiction.

Defs.' Mot. at 3. Further, all four of the above-referenced partnership agreements contain an integration clause stating that "[t]his agreement contains the entire agreement . . . and all prior agreements . . . are terminated." *Id.* at 2.

Because Plaintiff signed the 1996 Amendment No. 1 and the 1998 Partnership Agreement, Plaintiff concedes that the following claims must be compelled to arbitration: (1) the enforceability of the 1996 Amendment No. 1 and the 1998 Partnership Agreement; (2) breach of the 1996 Amendment No. 1 and the 1998 Partnership Agreement; (3) repudiation; and (4) breach of the duty of good faith and fair dealing. Plaintiff has already instigated arbitration proceedings with the American Arbitration Association ("AAA") on those issues, but has asked the AAA to stay her claims until this

court rules on Defendants' motion. Therefore, this court is left to consider whether Plaintiff's remaining claims for (1) breach of the 1994 and 1996 Partnership Agreements; (2) breach of fiduciary duty; (3) violations of Title VII and/or TCHRA; and (4) violations of the Equal Pay Act must also be compelled to arbitration.

II. ANALYSIS

Section two of the Federal Arbitration Act ("FAA") states that a written arbitration agreement in any contract involving interstate commerce is valid, irrevocable, and enforceable except on grounds that would permit the revocation of a contract in law or equity.[2] *See* 9 U.S.C. § 2. Section four of the FAA allows a party to seek an order compelling arbitration if the other party has failed to arbitrate under a written arbitration agreement. *See id.* § 4. If a suit is filed in federal court and the court finds that one or more of the issues is referable to arbitration, § 3 of the FAA requires a court to stay the action pending arbitration. *See id.* § 3. When ruling on a motion to compel arbitration, the district court must consider two things: "(1) whether a valid agreement to arbitrate between the parties exists; and (2) whether the dispute in question falls within the scope of that arbitration agreement." *Pennzoil Exploration and Production Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1065 (5th Cir.1998) (citations omitted). In the instant case, both parties agree that a valid arbitration agreement exists; therefore, this court only needs to determine if Plaintiff's remaining claims fall within the scope of the agreement.

A. Scope of the Arbitration Agreement

In determining the scope of an arbitration agreement that falls under the FAA, the court must apply the "federal substantive law of arbitrability." *Harvey v. Joyce*, 199 F.3d

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[2] Neither party disputes that this case involves a transaction involving interstate commerce.

790, 793 (5th Cir.2000) (citing *Moses H. Cone Memorial Hosp. v. Mercury Const.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)). Federal law in this area requires the court to apply ordinary state law principles of contract construction. *See Webb v. Investacorp, Inc.*, 89 F.3d 252, 258 (5th Cir.1996) (citations omitted). Texas contract law requires the court to determine the intent of the parties by interpreting the language of the contract in its plain grammatical meaning unless doing so would defeat the parties' intentions. *See R & P Enterprises v. LaGuarta, Gavrel & Kirk, Inc.*, 596 S.W.2d 517, 518-19 (Tex.1980) (citations omitted); *Ikon Office Solutions, Inc. v. Eifert*, 2 S.W.3d 688, 694 (Tex.App.—Houston [14th Dist.] 1999, no pet.) (citation omitted). Further, because arbitration is a matter of contract, a party cannot be compelled to submit any dispute to arbitration which he has not agreed to submit. *See United Offshore Co. v. Southern Deepwater Pipeline Co.*, 899 F.2d 405, 408 (5th Cir.1990) (citing *AT & T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)); *see also Volt Info. Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior Univ.*, 489 U.S. 468, 474-75, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989) (stating that § 4 of the FAA "does not confer a right to compel arbitration of any dispute at anytime; it confers only the right to obtain an order directing that 'arbitration proceed in the manner provided for in [the parties'] agreement'") (*quoting* 9 U.S.C. § 4) (emphasis not in statute).

In applying the rules of contract law, however, the court must bear in mind the strong federal policy favoring arbitration. *See Webb*, 89 F.3d at 258 (citation omitted). The law of arbitration calls for a presumption that when the scope of an arbitration agreement is reasonably in doubt, it should be construed in favor of arbitration. *See Mar-Len of Louisiana, Inc. v. Parsons-Gilbane*, 773 F.2d 633, 635 (5th Cir.1985) (citing *United Steelworkers of America v. Warrior*

& Gulf Navigational Co., 363 U.S. 574, 583, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960)). "[A]rbitration should not be denied 'unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation that could cover the dispute at issue.'" *Id.* at 636 (citation omitted). "This presumption can be overcome with clear evidence that the parties did not intend the claims to be arbitrable." *Harvey*, 199 F.3d at 793 (citation omitted).

Keeping in mind the strong federal policy in favor of arbitration, it is also important to note that the Fifth Circuit has made a distinction between "narrow" and "broad" arbitration clauses. *See Complaint of Hornbeck Offshore (1984) Corp. v. Coastal Carriers Corp.*, 981 F.2d 752, 754 (5th Cir.1993). An arbitration clause is characterized as narrow when the language of the clause requires the arbitration of disputes "arising out of" the agreement. *See Pennzoil*, 139 F.3d at 1067. A broad arbitration clause, on the other hand, includes language such as "any dispute that arises out of or relates to" the agreement, or disputes that are "in connection with" the agreement. *See id.* Here, the arbitration clause states that "[t]he equity partners and non-equity partners shall make a good faith effort to settle *any dispute or claim arising under this partnership agreement*" and if the partners "fail to resolve *a dispute or claim*, such equity or non-equity partner shall submit *the dispute or claim* to binding arbitration." Defs.' Mot. at 3 (emphasis added).

Defendants argue that because the arbitration provision contains the words "any dispute" and the words "a dispute or claim," the court should interpret the clause broadly to cover all of Plaintiff's causes of action. The court is of the opinion, however, that the clause is better characterized as a narrow arbitration clause. The sentence containing the words "any dispute" clearly and specifically goes on to limit the disputes to "any dispute arising under this partnership agreement." *Id.* (emphasis added). In the next sentence, the words "a dispute

or claim" can only logically be construed as referring directly to the "dispute[s]" discussed in the preceding sentence. Unlike the arbitration clause in the *Hornbeck* case, which referred to "any dispute" whatsoever between the parties, this arbitration clause is focused on only those disputes arising out of the partnership agreement. Furthermore, this arbitration clause does not contain the broader terms "in connection with" or "relating to", which, according to the Fifth Circuit, distinguish a broad arbitration clause from a narrow clause which uses only the term "arising out of" or "arising under" the agreement. Therefore, the arbitration clause is a narrow clause, only requiring the arbitration of Plaintiff's claims which literally arise under the contract. *See Pennzoil*, 139 F.3d at 1067; *see, e.g., United Offshore Co.*, 899 F.2d at 408-09 (holding clause directing the arbitration of disputes "arising out of the interpretation of . . . this agreement" only covered disputes about contract interpretation); *Texaco, Inc. v. American Trading Transportation Co., Inc.*, 644 F.2d 1152, 1154 (5th Cir.1981) (holding that a claim for damage to a dock was not within the scope of the arbitration clause when the clause provided for the arbitration of disputes "arising out of this Charter"); *Beckham v. William Bayley Co.*, 655 F.Supp. 288, 291 (N.D.Tex.1987) (holding that a claim regarding performance under the contract did not fall within the scope of the narrow arbitration clause which only required the arbitration of disputes if the parties disagreed "as to the intent of this contract"). It is against this legal framework that the court now turns to its analysis of whether Plaintiff's claims are covered by the arbitration clause.

1. Breach of Contract

Plaintiff's first cause of action alleges that Defendants "breached the various partnership agreements from 1994 through 1998." Plt.'s Third Amended Complaint at 9. As stated above, Plaintiff signed four successive partnership agreements during that time period. The first two agreements

did not contain an arbitration clause, but the second two agreements each contained an arbitration clause. Plaintiff concedes that her claims for breach of the 1996 Amendment No. 1 and the 1998 Partnership Agreement are claims "arising under" those agreements and, therefore, are within the scope of the arbitration clauses within those agreements. Plaintiff disagrees, however, that her claims for breach of the 1994 and 1996 Partnership Agreements are subject to arbitration because neither of those agreements contains an arbitration clause. The court agrees with Plaintiff's assertion for three main reasons.

First, the conduct underlying the alleged breach of the 1994 and 1996 contracts occurred at a time when no arbitration clause was in effect. Plaintiff's complaint specifically alleges that during the time the four agreements were in effect, Defendants failed to properly calculate Plaintiff's compensation, failed to promote her, and deprived her of benefits from the tobacco case. If Defendants did participate in such conduct during the time that the 1994 and 1996 Partnership Agreements were in effect, such conduct could not have "arisen under" the 1996 Amendment No. 1 or the 1998 Partnership Agreement because those agreements did not even exist at that time. To the extent that the conduct Plaintiff complains of occurred when the 1996 Amendment No. 1 and the 1998 Partnership Agreement were in effect, however, her claims would be subject to arbitration.[3] *See, e.g., Security Watch, Inc. v. Sentinel Systems, Inc.*, 176 F.3d 369, 372 (6th Cir.1999) (arbitration provision in 1994 shipping agreement did not cover conduct that occurred under prior shipping agreements); *Necchi S.p.A. v. Necchi Sewing Machine Sales Corp.*, 348 F.2d 693, 698 (2d Cir.1965) (claim

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[3] For example, Plaintiff's allegations that Defendants deprived her of benefits from the tobacco case by forming the tobacco partnership would be subject to arbitration because the partnership entitled Provost * Umphrey Tobacco was created effective January 1, 1998.

based on conduct which had arisen "prior to" effective date of arbitration clause was not within scope of arbitration agreement); *Hendrick v. Brown & Root, Inc.*, 50 F.Supp.2d 527, 533-34 (E.D.Va.1999) (arbitration clause in fourth contract did not cover conduct that occurred when third contract was in effect); *Connett v. Justus Enterprises of Kansas, Inc.*, Civ. A. No. 87-1739-T, 1989 WL 47071, at *2 (D.Kan. March 21, 1989) (arbitration clause did not apply when alleged fraudulent conduct occurred before plaintiff executed contract with arbitration clause); *George Washington University v. Scott*, 711 A.2d 1257, 1260-61 (D.C.Ct. App.1998) (conduct that occurred before arbitration clause took effect was not arbitrable).

A second reason that the arbitration clause should not be interpreted as covering Plaintiff's claims for breach of the 1994 and 1996 Partnership Agreements is because the plain grammatical language of the arbitration clause gives no indication that it will apply retroactively. This is further evidence that the parties did not intend to arbitrate disputes that accrued before January 1, 1997, the effective date of the first arbitration clause. To interpret the arbitration clause to apply retroactively would cause Plaintiff to forego her vested right to litigate an accrued claim. *See, e.g., Security Watch*, 176 F.3d at 372-73 (arbitration clause did not reach disputes arising under earlier agreements because it is "nonsensical to suggest that [the plaintiff] would abandon its established right to litigate disputes arising under the [prior] contracts"); *Choice Security Systems, Inc. v. AT & T Corp. and Lucent Technologies, Inc.*, No. 97-1774, 1998 WL 153254, at *1 (1st Cir. Feb.25, 1998) (arbitration clause in 1994 contracts did not apply to pre-1994 contracts when the language of the arbitration clause did not indicate "that the parties ever contemplated so radical a retroactive renegotiation of their earlier agreements"); *Hendrick*, 50 F.Supp.2d at 535 (arbitration clause was not retroactive when the text of the clause expressed no language providing that it "reache[d] back in

time to require an employee to arbitrate a claim which had accrued before the contract was signed or the [arbitration clause] took effect"); *Connett*, 1989 WL 47071, at *2 (arbitration clause did not apply retroactively when it did not specify that it applied to past conduct); *Kenworth of Dothan, Inc. v. Bruner-Wells Trucking, Inc.*, 745 So.2d 271, 275-76 (Ala.1999) (arbitration clause was not retroactive when language of the clause did not so state); *George Washington University*, 711 A.2d at 1261 (arbitration clause was not retroactive when "the arbitration clause itself contained no indication whatsoever that its terms would apply . . . before [its effective date]").

Finally, the third reason the court finds that Plaintiff's claims for breach of the 1994 and 1996 Partnership Agreements are not within the scope of the arbitration clause is based on the specific and narrow scope of the clause. The court interprets the language "this partnership agreement" to refer to the 1996 Amendment No. 1 and/or the 1998 Partnership Agreement, not any other agreement. *See, e.g., George Washington University*, 711 A.2d at 1259 (affirming district court's holding that the words "this contract" in 1995 contract mean only the 1995 contract and do not include prior contracts). In order for Plaintiff's claim for breach of the 1994 and 1996 Partnership Agreements to be subject to arbitration, the language of the arbitration clause must have been more expansive. Defendants' insistence that the court should apply the presumption of arbitrability to cover all of Plaintiff's contract claims is not convincing because the presumption only applies when the arbitration clause "is fairly debatable or reasonably in doubt." *See Mar- Len of Louisiana*, 773 F.2d at 635. Here, the language of the clause is clear. Claims for breach of the 1994 and 1996 Partnership Agreements are simply not claims "arising under" the 1996 Amendment No. 1 or the 1998 Partnership Agreement. The narrow provision that the parties chose to use in their agreements evidences the parties' intent to limit the scope of

arbitration. In the absence of a broader provision, the arbitration clause cannot be held to cover all four agreements.[4]

Defendants disagree and argue that Plaintiff's claims for breach of any of the Partnership Agreements are arbitrable because each contract contained an integration clause. As a result, Defendants argue that the 1994 and 1996 Partnership Agreements have been completely restated and superseded—first by the 1996 Amendment No. 1 and then by the 1998 Partnership Agreement. The integration clause in the 1998 Partnership Agreement reads as follows:

> WHEREAS, the current Partners desire to amend and completely restate the partnership agreement between them in order to clarify each Partner's respective rights, obligations and entitlements in the Partnership.
>
> * * * *
>
> Section 13.15. Entire Agreement. This Agreement contains the entire agreement among the Partners relating to the subject matter hereof and all prior agreements relative hereto which are not contained herein are terminated.

Defs.' Mot. at 2. The purpose of an integration clause is to trigger the parol evidence rule which precludes the

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[4] The cases that this court was able to locate suggesting that an arbitration clause could include other contracts contained broad arbitration clauses and, thus, are distinguishable. *In re Hops Antitrust Litigation*, 655 F.Supp. 169, 172-73 (E.D.Mo.1987), for example, suggests that in some circumstances, if there is one general "umbrella" contract covering the parties' on-going relationship, claims arising under other contracts may be arbitrable even if the other contracts did not contain an arbitration clause. In cases where this rule has been applied, however, the arbitration clauses contained broad language, unlike the clause in the present case. *See, e.g., Consumer Concepts, Inc. v. Mego Corp.*, 458 F.Supp. 543, 544-45 (S.D.N.Y.1978) (arbitration clause in umbrella contract covering "any controversy or claim arising out of or related to this agreement" included claim arising under separate contract).

enforcement of inconsistent or prior agreements in a finalized contract. *See Hubacek v. Ennis State Bank*, 159 Tex. 166, 317 S.W.2d 30, 31 (1958). In this case, the integration clause prevents provisions or obligations in the 1994 Partnership Agreement, the 1996 Partnership Agreement, or the 1996 Amendment No. 1 from being enforceable in the 1998 Partnership Agreement. However, the integration clause does not necessarily require the conclusion that Plaintiff's claims for breach of the 1994 and 1996 Partnership Agreements fall within the scope of the arbitration clause.

The court was only able to locate one Texas case that dealt with a dispute similar to the issue presented in the instant case. *In Howell Crude Oil Co. v. Tana Oil & Gas Corp.*, 860 S.W.2d 634 (Tex.App.—Corpus Christi 1993, no writ), the plaintiff and the defendant entered into a series of three successive contracts governing the purchase and sale of crude oil. The third contract contained an integration clause which stated that the third contract "replaces and supersedes any and all other agreements [between the plaintiff and the defendant]." *Howell*, 860 S.W.2d at 638. Of the three contracts in that case, the second contract was the only one that contained an arbitration clause. The arbitration clause called for the arbitration of disputes "in the case of disagreement between the parties to this contract as to any right, obligation, term or provision thereof." *Id.* The plaintiff sued the defendant for breach of all three contracts, fraudulent misrepresentation, and quantum meruit. The court held that even though the integration clause in the third contract effectively terminated the second contract, any claims arising under the second contract were still subject to arbitration. Any claims arising after the effective date of the third contract, however, were not subject to arbitration.

Although the *Howell* court did not clearly state its reasoning, the court appears to have based its decision on the rationale that this court outlined above. Logically, claims

arising from the second contract were governed by the terms under that contract and claims arising under the third contract were subject to the terms of the third contract. Likewise, here the claims for breach of the 1994 and 1996 Partnership *729 Agreements should be governed by the rights and provisions that existed at that time.[5] At the time the claims for breach of the 1994 and 1996 Partnership Agreements accrued, it was not the intent of the parties to resolve those claims by arbitration. *Cf. Vanguard Underwriters Insurance Co. v. Vecellio Insurance Agency, Inc.*, No. 01-98-00986-CV, 1999 WL 159833, at *4-5 (Tex.App.—Hous. 1 Dist., March 11, 1999, no pet. h.) (holding that when there were two agency agreements, the second of which superseded and terminated the first, the tolling provision in the second agreement only applied to claims or conduct occurring after the effective date of the second agreement; the tolling provision did not apply to claims or conduct arising when the first agreement was in effect).

Although the Fifth Circuit has not addressed the "integration clause" argument raised by Defendants, other federal circuit courts have held that when there is a series of contracts, the most recent of which contains an arbitration clause and a "boilerplate" integration clause, claims arising under the earlier contracts are not subject to arbitration. In those decisions, the courts focus on the fact that a "run of the mill" integration clause does not serve to take away a party's right to litigate under prior contracts; rather, the purpose of an integration clause is to prevent prior unincorporated agreements from being enforceable in the final contract.[6]

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[5] Although the facts in *Howell* are a flip-flop of the facts in this case (here, the arbitration clause was a part of the later contracts, not the earlier contracts), the holding still applies.

[6] The courts also focus on the rationale outlined by this court above—*i.e.*, if the language of the arbitration clause gives no indication that it will apply retroactively it should not be construed to cover conduct that occurred prior to its effective date.

See, e.g., Security Watch, 176F.3d at 372-73 (arbitration clause did not reach disputes arising under earlier agreements despite the fact that the most recent agreement contained an integration clause because purpose of integration clause is to "signal to the courts that the parties agree that the contract is to be considered completely integrated"); *Choice Security Systems*, 1998 WL 153254, at *1 (standard integration clause in 1994 contracts did not incorporate arbitration clause of 1994 contracts into pre-1994 agreements because integration clauses are "designed to do nothing more than prevent any unincorporated side agreements" from becoming enforceable). State courts have also held this view. *See, e.g., Howell*, 860 S.W.2d at 638-39; *Kentucky Fried Chicken Corp. v. Collectramatic, Inc.*, 130 N.H. 680, 547 A.2d 245, 248-49 (1988) (integration clause in second of two successive contracts did not alter the rights and duties of the parties as to events that occurred under first contract; therefore, indemnification provision that was only a part of the first contract still applied to claims arising under the first contract).

Finally, Defendants' argument that the court should not bifurcate the breach of contract claims because it would result in inefficient adjudication in different forums is unavailing. The Supreme Court rejected such an argument in *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985). In that case, Byrd invested funds with Dean Witter and signed a contract containing a narrow arbitration clause which provided for the arbitration of disputes arising under the agreement. Byrd sued Dean Witter for violations of the Securities Exchange Act of 1934 and various state law claims in breach of the contract. The Court held that even though all the claims were intertwined, the claims must be bifurcated and only the state law claims could be compelled to arbitration. Claims which did not fall under the contract were to be litigated in court. The Court emphasized the reasoning behind its decision "was to enforce private

agreements into which the parties had entered . . . even if the result is 'piecemeal' litigation." *Byrd*, 470 U.S. at 221, 105 S.Ct. 1238.

Therefore, this court holds that it can be said with "positive assurance" that the arbitration clause is not susceptible of an interpretation that would cover the contract claims in dispute. First, the conduct giving rise to Plaintiff's claims arose at a time when an arbitration agreement was not in effect; second, the text of the arbitration clause did not indicate an intent to apply retroactively; and third, the narrow language of the clause limits its scope. Thus, Plaintiff's claims for breach of the 1994 and 1996 Partnership Agreements do not fall within the scope of the arbitration clause. To hold otherwise would be to require the parties to arbitrate claims that they did not agree to arbitrate.

2. Breach of Fiduciary Duty

The next consideration for the court is whether Plaintiff's claim for breach of fiduciary duty falls within the scope of the arbitration clause. The court holds that it does. When determining whether a tort claim falls within the scope of an arbitration clause, courts should focus on the factual allegations in the complaint, not on the characterization of the legal cause of action. *See Harvey*, 199 F.3d at 795 (*citing Mitsubishi Motors Corp.*, 473 U.S. 614, 622 n. 9, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)). Therefore, claims "arising under this partnership agreement" are not necessarily limited to breach of contract claims. *See id.* This is true even when there is a narrow arbitration clause. *See, e.g., Valero Energy Corp. v. Wagner & Brown*, 777 S.W.2d 564, 567 (Tex. App.—El Paso 1989, writ denied) (tort claim fell within scope of narrow arbitration clause). When applying this rule, the Fifth Circuit has held that the test is whether the tort is "'so interwoven with the contract that it could not stand alone.'" *See Ford v. NYLCare Health Plans of Gulf Coast*, 141 F.3d 243, 250 (5th Cir.1998) (citations omitted). In

Ford, the Fifth Circuit was applying Texas law under the Texas General Arbitration Act; however, the Fifth Circuit stated that "there is no perceptible difference between the federal and Texas standards" regarding the "interwoven with" test.[7] See id. at 250 n. 7 (5th Cir.1998). Therefore, this court will apply that test to Plaintiff's breach of fiduciary duty claim.

According to Defendants, Plaintiff's breach of fiduciary duty claim is sufficiently interwoven with the Partnership Agreements to make that claim arbitrable. To support their argument, Defendants cite a number of cases which have specifically held that a breach of fiduciary duty claim falls within the scope of an arbitration clause. *See* Defs.' Mot. at 13 (*citing Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F.2d 334 (7th Cir.1984), *Mediterranean Enterprises, Inc. v. Ssangyong Corp.*, 708 F.2d 1458 (9th Cir.1983), *Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 558 F.2d 831 (7th Cir.1977), *Prograph International, Inc. v. Barhydt*, 928 F.Supp. 983 (N.D.Cal.1996), and *Farino v. Advest, Inc.*, 651 F.Supp.510 (E.D.N.Y.1986)). The cases Defendants cite, however, are easily distinguishable. To start, the *Weissbuch* case did not even address the issue of whether a breach of fiduciary duty claim fell within the scope of the arbitration clause. As noted in the opinion, the plaintiffs' complaint in *Weissbuch* did not list breach of fiduciary duty as one of their counts. *See Weissbuch*, 558 F.2d at 832. Further, *Pierson*, *Prograph*, and *Farino*, all contained broad arbitration clauses

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[7] The federal standard is articulated in *Mitsubishi*, where the Court stated that when determining the scope of a broad arbitration clause, courts should look to whether the claim "touch[es] matters covered by" the contract. *See Ford*, 141 F.3d at 250 n. 7 (*quoting Mitsubishi*, 473 U.S. at 624-25, 105 S.Ct. 3346). *Mitsubishi* did not articulate a test for narrow arbitration clauses, such as the one in the present case. However, Texas courts apply the "interwoven with" test to both broad and narrow arbitration clauses; therefore, this court finds the "interwoven with" test the most appropriate test to apply.

covering disputes "relating to" or "in connection with" the contract; therefore, the scope of the clause covered a larger category of claims.[8] *See Pierson*, 742 F.2d at 336; *Prograph*, 928 F.Supp. at 987; *Farino*, 651 F.Supp. at 511. Finally, *Mediterranean Enterprises*, although containing a narrow "arising hereunder" arbitration clause, is also distinguishable because the fiduciary duty plaintiff claimed to have been breached by the defendant was "created by the [a]greement." Here, Plaintiff is suing under a common law fiduciary duty, not a fiduciary duty created by the Partnership Agreements. Therefore, the court does not find the cases Defendants cite to be particularly instructive.

To help guide its analysis, the court looks to *Ford*. *Ford* is helpful because the Fifth Circuit discussed in detail the significance of the Texas Court of Appeals decision in *Valero*. In *Valero*, the parties entered into a narrow arbitration clause directing the arbitration of "any disagreement arising under this Contract." *Valero*, 777 S.W.2d at 565. The *Valero* court held that the plaintiff's tort claim fell within the scope of the narrow clause because the tort claim was so interwoven with plaintiff's rights under contract that plaintiff "could have just as easily alleged a breach of contract action." *Id.* at 566. In studying the *Valero* opinion, the Fifth Circuit stated that the purpose of the rule which requires courts to look to the facts underlying the claim rather than the legal label attached to the cause of action, is to prevent a party from "artfully pleading" his claim in order to "dodge arbitration" of a dispute that would otherwise fall within the

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[8] Additionally, in the *Farino* case, the court did not fully address the merits of whether the plaintiffs' breach of fiduciary duty claim fell within the scope of the broad arbitration clause because the plaintiffs were not disputing it. *See Farino*, 651 F.Supp. at 513. Similarly, in *Prograph*, the plaintiff did not object to the arbitration of his breach of fiduciary duty claim. *See Prograph*, 928 F.Supp. at 990.

scope of the arbitration clause. *See Ford*, 141 F.3d at 250. Therefore, Plaintiff may not re-label her breach of contract claim as a breach of a common law fiduciary duty.

Here, the factual allegations underlying Plaintiff's breach of fiduciary duty claim allege that Defendants "inappropriately allocat[ed] fee credits, artificially depress[ed] firm income, usurp[ed] the opportunity of the Tobacco Case, and fail[ed] to properly pay and promote [Plaintiff]." Plt.'s Complaint at 10. Further, Plaintiff's complaint cites section 7.2 of the Partnership Agreements to support her allegation that Defendants have a duty of good faith and fair dealing.[9] Plaintiff does not dispute Defendants' assertion that the Partnership Agreements set forth "the rights, duties and obligations of the Managing Partner, the Equity Partners, and the Non-Equity Partners." Defs.' Reply at 10; see also Plt.'s Resp. at 7. Nor does Plaintiff dispute that such rights, duties, and obligations will have to be referred to and constructed in determining whether any fiduciary duty was breached. Plaintiff's only argument that her breach of fiduciary duty claim is not interwoven with the Partnership Agreements is that she is asserting a "common law" breach of fiduciary duty claim instead of one based on contract.

Even if it is conceivable that Plaintiff could maintain a claim for breach of fiduciary duty without the Partnership Agreements,[10] that alone is not sufficient grounds for concluding that the claim is not within the scope of the arbitration clause. The facts underlying Plaintiff's complaint show that, in essence, the claim is based on breach of contract. See *Ford,* 141 F.3d at 250; *Valero,* 777 S.W.2d

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[9] A fiduciary duty encompasses, at a minimum, a duty of good faith and fair dealing. *See Crim Truck & Tractor Co. v. Navistar International Transportation Corp.*, 823 S.W.2d 591, 594 (Tex.1992).

[10] *See Brewer & Pritchard v. Johnson*, 7 S.W.3d 862, 867 (Tex.App.—Houston [1st Dist.] 1999, no pet.) (fiduciary duty may exist between lawyers in a firm even in the absence of contract).

at 566. As stated above, the Partnership Agreements will determine whether a fiduciary duty was breached--whether that duty arises from the common law or from the contract itself. Not compelling Plaintiff's claim to arbitration would thus allow Plaintiff to dodge the scope of the arbitration clause by artful pleading. For these reasons, the court finds Plaintiff's breach of fiduciary duty claim to be subject to arbitration.

3. Statutory Violations: Title VII and/or TCHRA and Equal Pay Act

Plaintiff's statutory causes of action allege that Defendants violated Title VII and/or TCHRA by denying Plaintiff equal employment opportunities, treating her less favorably than male employees, and subjecting her to unwelcome sex-based conduct. Plaintiff's complaint further alleges that Defendants violated the Equal Pay Act by denying her equal pay, bonuses, and wages. The law is clear that statutory discrimination claims may be subject to arbitration. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991). The court holds that under the facts of this case, however, Plaintiff's statutory claims are not causes of action "arising under" the Partnership Agreements. Plaintiff's statutory rights remain fully independent of the contract. *See Brown v. Trans World Airlines*, 127 F.3d 337, 342 (4th Cir.1997) (holding plaintiff's Title VII claim was not subject to narrow arbitration clause even when the contract itself prohibited conduct similar to that of Title VII because Title VII remains fully independent of a contract); *see also Ford*, 141 F.3d at 250-51 (courts should look to whether the claim could stand independently from the contract).

Defendants cite certain language in the Partnership Agreements which they contend is relevant evidence in addressing the merits of Plaintiff's statutory claims, and that therefore to the claims are "interwoven with" the Partnership Agreements. Just because the Partnership Agreements may be referred to

as evidence, however, does not make Plaintiff's statutory claims arbitrable. *See Ford*, 141 F.3d at 250 (holding that it is irrelevant if the facts supporting the claim will implicate the agreement as an item of evidence because the focus is on whether the claim could be maintained without the contract). Because Plaintiff's statutory claims could be maintained independently of the contract, such claims do not fall within the scope of the arbitration clause.

Once again, the cases Defendants cite to the court to support their view are easily distinguishable on the grounds that they contain broad arbitration clauses. *See Mouton v. Metropolitan Life Ins.*, 147 F.3d 453, 456 (5th Cir.1998) (arbitration clause covering "any dispute, claim or controversy that may arise between [the parties]" broad enough to encompass Title VII claims); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 749 (5th Cir.1996) (arbitration clause covering "any other disputes" broad enough to encompass Title VII claims); *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 369 (7th Cir.1999) (arbitration clause covering "all disputes, including employment disputes" broad enough to encompass Equal Pay Act claim); *Williams v. Katten, Muchin & Zavis*, 837 F.Supp. 1430, 1437 (N.D.Ill.1993) (arbitration clause covering disputes "arising out of or relating to" the contract broad enough to encompass Title VII and § 1981 claims). These cases are not sufficiently analogous to convince this court to compel the arbitration of Plaintiff's statutory claims under the narrow clause in this case.

B. Defendants' Opposition to "Optional Procedures"

As a final matter, Defendants ask this court to issue an order requiring that the arbitrable claims be submitted to the AAA under the standard commercial arbitration rules. As explained earlier in this opinion, Plaintiff has already filed a demand for arbitration with the AAA on certain claims. When filing her demand, Plaintiff apparently requested that the arbitration be conducted under the "optional procedure for

large, complex commercial disputes." *See* Defs.' Reply at 12. Defendants argue that such optional procedures are not appropriate under the circumstances. Defendants do not cite any legal authority, however, suggesting that this court has the authority to compel the disputes to be submitted to the AAA under the standard commercial arbitration rules rather than the optional procedures. Further, even if the use of the optional procedures would be inappropriate, the issue is not ripe at this time. Plaintiff has made a request to the AAA for the optional procedures rules, but to the court's knowledge, the AAA has not stated whether it will grant Plaintiff's request. This is a matter better left to the expertise of the AAA. As a result, the court DENIES Defendants' request on this matter.

CONCLUSION

Based on the authorities cited and the reasoning outlined above, Defendants' motion is GRANTED IN PART and DENIED IN PART. Plaintiff's claims for (1) breach of the Partnership Agreements in effect after January 1, 1997; (2) repudiation; (3) breach of good faith and fair dealing; and (4) breach of fiduciary duty are referred to arbitration. Plaintiff's claims for (1) breach of the 1994 and 1996 Partnership Agreements; (2) violations of Title VII and/or TCHRA; and (3) violations of the Equal Pay Act are not compelled to arbitration, but are stayed until arbitration of the arbitrable claims has been completed. It is so ORDERED.